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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA L. SWAIN,

Petitioner,

v.

JOHN LEHMAN, JR., Secretary of the Navy.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

Is a federal employee who prevails in the administrative process on her claim of discrimination because of age, in violation of 28 U.S.C. § 633a, entitled to an award of attorneys' fees?

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JOHN LEHMAN, JR.,
SECRETARY OF THE NAVY.

==========

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

==========

The petitioner, Virginia L. Swain, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 6, 1983.

Opinions Below

The opinion of the Court of Appeals is unreported and is set out in the appendix hereto at pages 1a-2a The opinion of the district court of January 19, 1982 is reported at 28 E.P.D. ¶32,574, and 27 FEP Cases 1434 (D.D.C. 1982), and is set out in the appendix hereto at pages 3a-17a. The order of the district court is set out in the appendix at page 18a. The opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of Kennedy v. Whitehurst, 690 F.2d 951 (1982), which formed the basis of the per curiam affirmance below, has also been set out in the Appendix for the convenience of the court at pages 19a-87a.

Jurisdiction

The judgement of the Court of Appeals was entered on January 6, 1983. Jurisdiction of this court is invoked under 28

U.S.C. § 1254(1).

Statutory Provisions Involved

This case involves provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 633a and 29 U.S.C. § 216(b):

29 U.S.C. §633a:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.
>
> (b) Except as otherwise provided in this subsection, the

Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the review and evaluation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individ-

> ual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.
>
> (e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

Public Law 93-259, effective May 1, 1974.

In 1978, § 633a was amended in the following ways:

> Subsection (a) added age requirement of at least 40 years of age, and "personnel actions" following "except".

The following two new subsections were added in 1978;

> (f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.
>
> (g)(1) The Civil Service Commission shall undertake a study relating to the effect of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.
>
> (2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

Subsection (f) was made effective September 30, 1978; subsection (g) was made effective April 6, 1978.

29 U.S.C. § 216:

> (b) Any employer who violates the provisions of section 6 or section 7 of this Act [29 USC §§ 206 or 207]

shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USC §217] in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compen-

> sation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USC §§ 206 or 207] by an employer liable therefor under the provisions of this subsection.

This case also involves provisions of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 2302(b) and 7701(g)(2):

> 5 U.S.C. § 2302(b):
>
> "(b) Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-
>
> "(1) discriminate for or against any employee or applicant for employment-
>
> "(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 200e-16);
>
> "(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1976 (29 U.S.C. 631, 633a);
>
> "(C) on the basis of sex, as prohibited by section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d);

> "(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C.791); or
>
> "(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

This provision was added on October 13, 1978, P.L. 95-454, Title I, § 101a), 92 Stat. 1114.

5 U.S.C. § 7701(g)(2):

> (2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Sept. 6, 1966, P.L. 89-554, § 1.80 Stat. 530; Oct. 13, 1978, P.L.-454, Title II, § 205, 92 Stat. 1138.

Statement of the Case

This is an action brought by a federal government employee under the Age Discrimination in Employment Act. Petitioner, plaintiff below, filed an administrative complaint on August 11, 1977, complaining of age discrimination in her nonselection to a GS-6 branch secretary position and her not receiving a Quality Step Increase. (App. p. 4a) In the initial stages of her complaint she was assisted by a fellow employee who acted as her lay representative. (Affidavit of Petitioner in Support of Motion for Summary Judgment, p. 2.) An investigation was conducted under the provisions of 5 C.F.R. Part 713 (now 29 C.F.R. Part 1613),[1/] and, as a result,

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1/ 5 C.F.R. § 713.511, now 29 C.F.R. § 1613.511, provides for the processing of age discrimination complaints under the provisions governing complaints brought under Title VII, with certain exceptions.

the Department of the Navy issued a proposed disposition that found no discrimination against petitioner. (Ibid.)

In May, 1978, petitioner retained private counsel to represent her. Her attorney requested a hearing on her behalf and asked to be provided with relevant documents of the agency. A hearing was initially set for August, 1978, and the complaints examiner ordered that the defendant provide many of the documents that had been requested. (Affidavit of Valerie V. Ambler, pp. 1-2.) As a result, the hearing was delayed until the following year when a three-day hearing was held on July 16 and 17 and September 11, 1979. At the hearing the agency was also represented by a lawyer who was an agency employee. (App. p. 4a.) Fourteen witnesses were called for examination and cross-examination, and plaintiff's

attorney filed a written closing statement. (Affidavit of Valerie V. Ambler, p. 2.)

In August, 1980, the complaints examiner issued his recommended decision finding in favor of the petitioner. Subsequently, on October 29, 1980, the defendant issued a final decision adopting the recommended decision and finding discrimination against the plaintiff because of her age. Appropriate relief, with the exception of attorneys' fees, was ordered. (App. pp. 4a-5a).

A civil action was initiated in the United States District Court for the District of Columbia. By stipulation the issues were limited to the question of whether plaintiff could obtain attorneys' fees and costs for the work done in the administrative process which resulted in her prevailing in the case. (App. p. 5a.)

On January 19, 1982, the district court issued a memorandum opinion and order denying plaintiff's motion for attorneys' fees and costs. (App. pp. 3a-18a.) This opinion was subsequently affirmed summarily by the Court of Appeals based on its earlier decision in Kennedy v. Whitehurst, 690 F.2d 951 (D.C. Cir. 1982). (App. 1a-2a.) In Kennedy the Court of Appeals held that under the statutory scheme set up by Congress employees of the federal government, unlike all other employees, could not recover attorneys' fees and costs when they prevailed on the merits of their age discrimination claim in the administrative process. In Kennedy the court cited with approval and relied upon the district court's opinion in the present case. (App. 19a-87a.)

This petition is filed to seek review of the decision of the Court of Appeals.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

This Case Presents Important Issues Unresolved by The Court Relating to The Administration of The Age Discrimination in Employment Act.

In 1967 Congress passed the Age Discrimination in Employment Act, which prohibited discrimination against employees because they were between the ages of 40 and 70. In 1974 the Act was amended to provide similar protection for federal employees. As this Court has noted, the language adopted to extend the protection to federal employees was modeled closely upon the language of Section 717 of the Equal Employment Act of 1972 (42 U.S.C. § 2000e-16) which extended the protection of Title VII of the Civil Rights Act of 1964 to federal employees. Lehman v.

Nakshian, 453 U.S. 156, 163-64 (1981).[2/]

In Nakshian this Court, for the first time, interpreted the federal government provisions of the A.D.E.A. and held that they did not provide the right to a jury trial to federal employees. One of the grounds for the Court so holding was that the 1974 Act was patterned after Title VII which also did not provide for a jury trial. But the Court indicated that Congress did intend to give federal employees who claim age discrimination the same rights as federal employees that claimed race, sex, religious, or national origin discrimination under Title VII. Of course,

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2/ In 1978 the A.D.E.A. was further amended to provide, inter alia, that "any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act under the then provisions of Section 12(b) of this Chapter other than the provisions of this section."

employees raising claims under Title VII are entitled to recover their attorneys' fees if they prevail for work done at both the administrative and court levels. See New York Gaslight Co. v. Carey, 447 U.S. 54, 61 n.2 (1980), citing with approval, Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

Nevertheless, in Kennedy v. Whitehurst, supra, the court below interpreted Lehman v. Nakshian and the somewhat convoluted statutory scheme enacted by Congress, to bar the recovery of attorneys' fees at the administrative level by federal employees whose discrimination claims are based on their age. 3/ The

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3/ The Court in Kennedy did not hold that federal employees were not entitled for fees for legal work done in connection with court proceedings, but left the issue open. See App., pp. 85a-86a.

implications of such a decision are important since they could seriously undermine the Congressional purpose of encouraging the informal resolution of discrimination complaints, and lead to the filing of actions in federal court prematurely and unnecessarily. See New York Gaslight Co. v. Carey, 447 at 65.

Here plaintiff-petitioner followed, in good faith, the administrative procedures held out to her as being an available and, indeed, perhaps necessary, predicate to her obtaining relief for her claim of discrimination. See Brown v. General Services Administration, 425 U.S. 820 (1976). She was fully successful in those endeavors, but only after she had retained private counsel who vigorously and effectively prosecuted her claim.

As noted supra, the Department of the Navy was represented by counsel, a Navy

employee on full salary. It can only be assumed that had petitioner remained unrepresented she would have failed in the administrative process and would then, if she still sought vindication of her meritorious claim, have had to file in district court. A rule that fees will be available only if the plaintiff went to court would simply encourage avoiding available administrative remedies and the consequent overburdening of the federal courts with cases which couldbe resolved otherwise. See New York Gaslight Club v. Carey, 447 U.S. at 65.

The effect of such a result on the administration of the federal courts presents important issues which should be addressed and resolved by this Court. The protection of the statutory rights of many thousands of federal employees who are entitled to the protection of the

A.D.E.A. makes the issue of broad public importance.

II.

The Decision of the Court Below Conflicts with The Decisions of This Court And Is Inconsistent with The Purpose of Congress.

A. Counsel Fees Are Available to Federal Employees Under The A.D.E.A.

On May 1, 1974, by Public Law 93-259, the A.D.E.A. was amended to provide the following relevant sections for federal employees in Section 15: 4/

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments...in executive agencies...(including employees and applicants for employment who are paid from

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4/ By the 1978 amendments to the A.D.E.A., Congress inserted the words in (a) "who are at least 40 years of age" after "applicants for employment" and "personnel actions" after "except."

> nonappropriated funds), in the United States Postal Service and the Postal Rate Commission,...and in the Library of Congress shall be made free from any discrimination based on age.
>
> (b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, included reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section....
>
> (c) Any persons aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

Following the inclusion of federal employees under the A.D.E.A. in 1974, courts ruled that federal employees who prevailed in an A.D.E.A. action had the same right to attorneys' fees and costs as private

employees. See, for example, Johnson v. Hidalgo, 23 E.P.D. ¶31,125 (D.D.C. 1980); Jones v. Cleland, 466 F. Supp. 34 (N.D. Ala. 1978); DeFries v. Haarhues, 488 F. Supp. 1037 (D.C. Ill. 1980).

Effective September 30, 1978, Section 15 of the A.D.E.A. was amended to provide, inter alia, that "Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section." (§15(f)). The issue before this Court is whether the 1978 amendments deleted a federal employee's right to attorneys' fees and costs when he prevailed in an A.D.E.A. action. Recent court decisions and the legislative history of the A.D.E.A. and other civil rights legis-

lation indicate that this right was not so deleted.

First, an award of attorneys' fees is not a "personnel action" and does not affect personnel actions. It is an award of relief to the age bias claimant to make him or her whole. Thus, by the very language of subsection (f) it is not applicable to an award of attorneys' fees and costs. Hence, as before passage of the 1978 amendments, reference can be made to the full act to determine Congressional intent on the subject of relief.

As noted above, in Lehman v. Nakshian, 453 U.S. at 163-64, this Court held that,

> §§15(a) and (b) [of the ADEA] are patterned after §§717(a) and (b) of the Civil Rights Act of 1964, as amended in March 1972, see Pub. L. 92-261, 86 Stat. 111-112, which extend the protection of Title VII to federal employees. 42 U.S.C. §§2000e-16(a) and (b). See 118 Cong. Rec. 24397 (remarks of Sen. Bentsen, principal sponsor of §15 of ADEA).

Title VII claimants are entitled to any relief to make them "whole" for the discrimination they have suffered. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Federal employees have long been entitled to back pay, retroactive promotions, reinstatement rights, training, injunctive relief, attorneys' fees, costs and any other relief to make them "whole" under Title VII.

Congress specifically provided in section 15 of the A.D.E.A. that federal employees are entitled to "such legal and equitable relief as will effectuate the purposes of this Act". It is beyond doubt that attorneys' fees and costs are relief that will not only effectuate the purposes of the Act but without which the effectuation of the Act will be substantially diminished. If a plaintiff is required to bear the costs of his/her attorneys'

fees, few plaintiffs will assert their rights under the Act.

Congress has found that attorneys' fees and costs will effectuate the purpose of all civil rights acts, including Title VII, the A.D.E.A. when it was passed in 1967, the Equal Pay Act (29 U.S.C. § 206), and the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982). Furthermore, Congress has never indicated it intended to carve out an exception for federal age bias claimants by denying them recovery of attorneys' fees and costs.

On the contrary, Congress has repeatedly demonstrated its concern that civil rights litigants be afforded attorneys' fees and costs. For example, in the legislative history[5/] of the Civil Rights

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5/ The legislative history of this statute may be relied upon in construing other related states. Cannon v. University of Chicago, 441 U.S. 677, n.6 (1979); New York Gaslight Co. v. Carey, 447 U.S. 54, 70 n.9 (1980).

Rights Attorneys' Fees Act of 1976 (42 U.S.C. § 1988), the Senate Report states,

> The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. The very first attorneys' fees statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.
>
> * * *
>
> Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions. (footnotes omitted)

S. Rep. No. 94-1611 (94th Cong. 2d Sess.) p. 3.

Since, in Section 15(c), Congress gave federal employees the right to such legal and equitable relief as would effectuate the purposes of the Act, that section

includes attorneys' fees and costs. As Congress indicated on p. 2 of S. Rep. No. 94-1611, supra:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

All civil rights claimants have the right to attorneys' fees, a fact re-emphasized by Congress in 1980 when it enacted the Equal Access to Justice Act. Effective October 21, 1980, Congress provided for fees and expenses of attorneys to a prevailing party in an action against an agency of the United States. (28 U.S.C. § 2412 as amended (1980).) The statute provides that "Unless expressly prohibited by statute, fees and costs may be awarded

in any civil action where a party prevails against the federal government." 28 U.S.C. § 2412(b). Thus, after passage of the Equal Access to Justice Act it is now clear that any ambiguities concerning the entitlement to attorneys' fees for prevailing parties in civil rights cases are to be resolved in favor of the claimant.

The petitioner is entitled to fees and costs incurred in the administrative process as a "prevailing party". The importance of attorneys' fees for services rendered at the administrative level has long been recognized. New York Gaslight Co. v. Carey, supra; Parker v. Califano, 561 F.2d 320, 333 (D.C. Cir. 1977). The petitioner was unable to obtain relief in the administrative process until she retained an attorney. A hearing was held in which an attorney represented the agency. The hearing lasted three days,

during which fourteen witnesses were examined and cross-examined. The hearing procedures demonstrate the need for an attorney as reference is made to opening statements, examination and cross-examination of witnesses, objections, offers of proof, and closing statements.[6/] Those procedures also make specific reference to representatives of both the complainant and the agency.[7/]

Congress specifically provided in Section 15 of the A.D.E.A. that, "the [then] Civil Service Commission shall... provide for the acceptance and processing of complaints of discrimination in Federal

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6/ These provisions are now found at 29 C.F.R. § 1613.218.

7/ Indeed, the petitioner has alleged that she would not have known what to do or how to do the things her attorney did to represent her in preparation for and at the hearing. She further stated that she did not believe she could have won if she had not been represented by an attorney.

employment on account of age." In response, the Civil Service Commission promulgated 5 C.F.R. §§ 713.501-713.521 wherein it provided that age complaints would be processed in accordance with § 713.213-.22, the sections utilizd to process complaints under Title VII.

Thus, Congress has clearly evinced an intent that age complaints be processed in a manner similar to Title VII complaints. As noted, this court has held in Nakshian, supra, that age complaints are to be patterned after Title VII. In Brown v. General Services Administration, 425 U.S. 820, 831-833 (1976), this Court further held that "Sections 717(b) and (c) [of Title VII] establish complementary administrative and judicial enforcement mechanisms designed to eradicate federal employment diuscrimination." It further found that

§ 717 "provides for a careful blend of administrative and judicial enforcement powers."

Sections (b) and (c) of the A.D.E.A. are very similar to sections (b) and (c) of Title VII. Therefore, the conclusion should also follow that Congress intended to provide complementary administrative and judicial enforcement mechanisms under the A.D.E.A., including attorneys' fees and costs for the administrative processing of these cases.

B. A Contemporanenous Statute Makes It Clear That Congress Intended That Federal A.D.E.A. Complainants Be Able to Receive Attorneys' Fees.

In 1978, contemporaneously with the passage of Section 15 of the A.D.E.A., Congress passed the Civil Service Reform Act of 1978. As part of the Civil Service Reform Act, Congress created the Merit

Systems Protection Board (MSPB, to hear cases brought by federal employees. Congress also defined the prohibited personnel practices about which an employee could complain to the MSPB in 5 U.S.C. § 2302 to include the following prohibition:

> "(b) Any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-
>
> "(1) discriminate for or against any employee or applicant for employment-
>
> "(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 200e-16);
>
> "(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1976 (29 U.S.C. 631, 633a);
>
> "(C) on the basis of sex, as as prohibited by section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C.206(d);
>
> "(D) on the basis of handicapping condition, as prohibited under section 501 of

> the Rehabilitation Act of 1973 (29 U.S.C. 791); or
>
> "(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(emphasis supplied). Thus, clearly "prohibited discrimination" includes age discrimination as proscribed by the A.D.E.A.

As to the question of attorneys' fees, Congress further provided, in 5 U.S.C. § 7701(g)(2), which governs MSPB proceedings:

> (2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Thus, attorneys' fees are allowable for <u>any</u> type of discrimination, including age, in which the appellant is found to be the

prevailing party in the administrative process.

In the legislative history, Congress stated the following:

> "...statutory law already provides for the award of attorney fees whenever a party in a discrimination suit prevails. The section [7701] preserves the right of the Board to award attorneys fees under this different [prevailing party] standard whenever it finds the employee's rights under the laws prohibiting discrimination have been violated." 96 Cong. 2d Sess., Senate Report No. 95-969, p. 61 (emphasis added).

Thus, it is clear that Congress believed and so stated that attorneys' fees were already available to federal employees in administrative cases of age discrimination at the time of passage of the Civil Service Reform Act of 1978.

By virtue of these provisions of the Civil Service Reform Act, federal employees

who raise an issue of age discrimination administratively before the MSPB are clearly entitled to attorneys' fees and costs if they are a prevailing party. This provision was intended to preserve the right to fees which Congress stated already existed. Issues of discrimination may be raised before the MSPB in so-called "mixed cases" which are otherwise appealable to the MSPB (5 U.S.C. § 7702(a)), such as adverse actions. An employee who is the subject of an adverse action which s/he believes is discriminatory because of age or other illegal bases, may appeal to the MSPB or may file a complaint of discrimination through the agency EEO procedures, the same procedures utilized by the petitioner.

In sum, when Congress created the MSPB in 1978, it defined the powers of this new administrative agency and clearly stated it was preserving (not creating) the right to

attorneys' fees at the administrative level when a federal employee prevailed on an age discrimination claim. Thus, Congress clearly believed that statutory law already provided for attorneys' fees.

This statement was made contemporaneously with Congress' enactment of the 1978 amendments to the A.D.E.A. Indeed, the Senate Report quoted above was issued and the Civil Service Reform Act was passed after the passage of the amendments to the A.D.E.A. 8/ Therefore, it is clear that at the time the Congress was considering the Civil Service Reform Act, it believed that the just enacted A.D.E.A. amendments provided attorneys' fees in the administrative process and that this existing right

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8/ The A.D.E.A. amendments were passed by the Senate on March 23, 1978 (P.L. 92-256). S. Rep. No. 95-969 was issued on July 10, 1978, and the Civil Service Reform Act was passed by the Senate on October 4, 1978 (P.L. 95-454).

had to be preserved.

Petitioner therefore urges that the legislative history of the Civil Service Reform Act provides clear evidence of Congressional intent to award counsel fees even in the absence of an explicit authorization of fees in the statute. To hold otherwise would be contrary to the clear statement of intent of Congress and create the anomolous result that only federal employee age bias victims who do not take the route of administrative redress to the MSPB are not entitled to attorneys' fees upon prevailing while private sector, federal sector court litigants, and federal sector MSPB claimants are entitled to attorneys' fees. Nowhere has Congress indicated it intended this result.

III.

The Decision Below Is Contrary to Decisions of This Court Governing The Retroactive Application of Statutes.

Prior to the 1978 amendments to A.D.E.A., there was no question but that federal employees had the right to attorneys' fees and costs when they prevailed under the A.D.E.A. Those fees and costs were recovered pursuant to 29 U.S.C. § 216, which was incorporated by reference into the A.D.E.A. by Section 7(b) of the A.D.E.A. Specifically, Section 7(b) provides, "The provisions of this Act shall be enforced in accordance with ... 29 U.S.C. §211(b), 216, 217...." Section 216 of 29 U.S.C. provides, inter alia, "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys' fee to be paid by the defendant, and costs of the action."

Since this case commenced prior to the 1978 amendments, and the agreement between the plaintiff and her attorney was reached prior to those amendments (effective September 30, 1978), under this Court's decisions in Bradley v. Richmond School Board, 416 U.S. 696 (1974), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1966) plaintiff should be awarded attorneys' fees and costs.

In addressing the question of whether a law should be applied retroactively, the Supreme Court held in Thorpe, supra, at 282 that the general rule is a court must apply the law in effect at the time it renders its decision, unless manifest injustice would result. Thorpe cited Greene v. United States, 376 U.S. 149 (1964), in which the Court held a claimant's right to lost earnings had matured or vested and declined to give retroactive effect to

a new regulation that took effect while his claim was being processed.

In Bradley, the Court further explained its holding in Thorpe,

> Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in [U.S. v.] Schooner Peggy [1 Cranch 103, 2 L ed 49, 51 (1801] suggested that such injustice could result "in mere private cases between individuals," and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." 1 Cranch, at 110, 2 L Ed 49.
>
> * * *
>
> The concerns expressed by the Court in Schooner Peggy and in Thorpe relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

416 at 717. 9/

9/ The Court then applied those three factors to the facts in Bradley and determined that "manifest injustice" would not result there. Id. p. 718-721.

Applying that analysis to the present case, the parties consist of (1) an individual who has suffered age discrimination and (2) the federal government agency who was responsible for that discrimination. The nature of their rights is that at the time the plaintiff filed her administrative complaint, there was clearly a right to attorneys' fees for federal age bias claimants who were prevailing parties. The federal government did not have a right to discriminate, nor a right to expect successful civil rights litigants to bear their own attorneys' fees. Thus, even assuming that there is no present right to attorneys' fees and costs under the A.D.E.A., under Bradley, Thorpe, and Greene, attorneys' fees and costs should be awarded here, since otherwise manifest injustice would result. Therefore, the decision of the Court below is contrary

to those decisions and should be reviewed by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS,
January 6, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1290 September Term, 1982
Civil Action
No. 80-03090

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VIRGINIA L. SWAIN,

Appellant
v.

JOHN LEHMAN, JR., Filed Jan. 6, 1983
Secretary of the Navy, et al.

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Appeal From The United States District Court for The District of Columbia

Before ROBINSON, Chief Judge, WILKEY and MIKVA, Circuit Judges.

J U D G M E N T

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasioned no need for an opinion, they

have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the order of the district Court appealed from in this cause be and hereby is affirmed. See Kennedy v. Whitehurst, ___ U.S. App. D.C. ___, 690 F.2d 951 (1982).

It is further ordered that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam
By the Court

/s/George A. Fisher
Clerk

DECISION OF THE DISTRICT COURT,
January 19, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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VIRGINIA L. SWAIN,

Plaintiff

vs.

SECRETARY, U.S. DEPARTMENT OF THE NAVY,

Defendant.

Civil Action
No. 80-3090

FILED
JAN. 19, 1982

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MEMORANDUM OPINION

Plaintiff, who prevailed in an age discrimination claim against her federal employer at the administrative level, seeks attorney's fees and costs. No factual issues remain in dispute and both parties have moved for summary judgment. For the reasons that follow, we conclude that plaintiff is not entitled to such fees and costs and, accordingly, that defendant's

motion for summary judgment should be granted.

Factual Background

On August 11, 1977, plaintiff filed an administrative age discrimination complaint against her employer, the Department of the Navy. Plaintiff, who at that time was a 60-year old GS-5 level employee, alleged that the Navy discriminated against her on the basis of age by not selecting her for a GS-6 position and by denying her a Quality Step Increase.

In 1979, hearings were held on plaintiff's complaint at the administrative level at which both parties were represented by counsel. In August, 1980, the Equal Employment Opportunity Commission Complaints Examiner issued a decision which held that the Navy had discriminated against plaintiff by failing to promote her. On October 29, 1980, defendant issued the Complaints Examiner's opinion as

a final decision and awarded plaintiff a retroactive promotion to the GS-6 level plus back pay and corresponding retirement adjustments.

The present action was filed on December 3, 1980. On September 18, 1981, the parties stipulated to the voluntary dismissal of both counts of the complaint except for the issue in count one of attorney's fees and costs sought by plaintiff in connection with the administrative proceedings. Plaintiff and defendant filed cross-motions for summary judgment and the remaining issue of law has been thoroughly briefed.

Discussion

The specific issue which confronts us concerns plaintiff's entitlement to recover costs and attorney's fees in connection with a 1980 administrative decision which found age discrimination against plaintiff in her job with the

federal government.

In general, under the "American Rule," a successful litigant is not entitled to recover fees and costs from the opposing party. While Congress has carved out certain explicit exceptions for the allowance of attorney's fees under specific statutes, the Supreme Court has cautioned that the courts should not create an entitlement to attorney's fees absent such express congressional authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260-62 (1975).

A separate limitation against the shifting of fees and costs, in addition to the "American Rule," arises where the United States is the party to be charged with such expenses. This is the ancient and well-established doctrine of sovereign immunity. Under this doctrine, attorney's fees and costs may be lodged against the federal government only where Congress

clearly has consented by statute to be liable for those expenses. N.A.A.C.P. v. Civiletti, 609 F.2d 514, 516-17 (D.C. Cir. 1979); Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186, 1189 (D.C. Cir. 1977).

Plaintiff brought her successful administrative claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq. Section 15 of the ADEA, which was added to the Act by an amendment in 1974, provides a cause of action for discrimination on account of age in federal government employment. 29 U.S.C. § 633a. In 29 U.S.C. § 626(b) the ADEA incorporates by reference the general provision of the Fair Labor Standards Act (FLSA) which provides for the award of attorney's fees and costs. 29 U.S.C § 216(b).[1/] However, under a 1978

1/ 29 U.S.C. § 216(b) provides in pertiment part, "The court in such action shall, in addition to any judgment awarded to the

amendment to the ADEA, the section of the FLSA concerning attorney's fees and costs is not made applicable to claims of age discrimination in federal government employment. 29 U.S.C § 633a(f).

Defendant insists that 29 U.S.C. § 633a(f) prohibits an award of attorney's fees and costs in the present case. Plaintiff contends that §633a(f) does not expressly prohibit such an award and that Congress intended to provide relief which includes fees and costs for federal employees who are the victims of age discrimination. However, we need not address the general availability of attorney's fees and costs to a prevailing party in age discrimination suits against the federal government. We conclude that

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1/ continued

plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action.

regardless of the impact of 633a(f), plaintiff is not entitled to attorney's fees and costs.

Judge Gasch of this court, in a case strikingly similar to the present action, held that attorney's fees and costs are not available to a successful age discrimination litigant for services of counsel at the administrative level. Kennedy v. Whitehurst, 509 F. Supp. 226 (D.D.C. 1981). While plaintiff in Kennedy was an employee who fell within the ADEA provision applicable to federal employees, the court did not base its decision on 29 U.S.C. § 633a (f). Rather, it concluded that even under the attorney's fee provision of FLSA, as incorporated into ADEA by 29 U.S.C. § 626(b), successful age discrimination claimants are not entitled to recover the costs of representation at the administrative level.2/

2/ Plaintiff argues that the attorney's

In Kennedy, the court reasoned that both the language of 29 U.S.C. § 216(b) and the statutory scheme of the ADEA indicate that Congress did not intend to award attorney's fees and costs at the administrative level to age discrimination claimants. The language of § 216(b) speaks of an award to "plaintiff," after an "action," and "judgment;" words associated with judicial rather than administrative proceedings. In addition, the court observed that unlike discrimination claims brought under Title VII of the Civil Rights Act,

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2/ Fee provision of FLSA (29 U.S.C. § 216(b)) applies to her claim because she commenced suit at the administrative level and retained counsel before Congress made that section inapplicable to federal employees through 29 U.S.C. § 633a(f). However, we need not address the retroactive applicability of § 633a(f) because even if § 216(b) applies to plaintiff's claim, she is not entitled to attorney's fees and costs for services of counsel at the administrative level. Kennedy v. Whitehurst, supra, at 230-231.

which provides for attorney's fees at the administrative level, the ADEA does not include a provision requiring exhaustion of administrative remedies beyond a simple notice requirement. Thus, because resort to administrative procedures is merely an alternative option to the commencement of a judicial action for an age discrimination claimant, that claimant is not entitled to the expenses of counsel at the administrative level. Kennedy, supra, at 230-231. Another recent decision similarly concluded that because the applicable statutory enforcement scheme provided plaintiff with "the option of proceeding initially in federal court," attorney's fees and costs were not available for the assistance of counsel at the "optional" administrative proceedings. Spancrete Northeast, Inc. v. International Association of Bridge, Structural and

Ornamental Ironworkers, 514 F. Supp. 326, 334 (N.D.N.Y. 1981) (request for attorney's fees and costs after a favorable decision by the National Labor Relations Board).

In response, plaintiff argues that the right under Title VII to attorney's fees and costs at the administrative level should be applied to age discrimination claims based on federal government employment. For support, plaintiff points to dicta in a recent Supreme Court decision which notes, "§§ 15(a) and (b) [29 U.S.C § 633a] are patterned after §§ 717(a) and (b) of the Civil Rights Act of 1964 . . . which extend the protection of Title VII to federal employees." Lehman v. Nakshian, 49 U.S.L.W. 4835, 4837 (1981)(age discrimination claimant not entitled to a jury trial in action against the federal government under 29 U.S.C. § 633a. From the court's general observation that the

extension of the ADEA to federal workers was modelled after an earlier extension of Title VII to those same employees, plaintiff concludes that § 15 of ADEA incorporates the specific section of Title VII which grants attorney's fees and costs for services of counsel at the administrative level. We do not agree.

In Nakshian the Court cited remarks of Senator Lloyd Bentsen (D-Tex.), the principal sponsor of § 15 of the ADEA, for the assertion that § 15 was patterned after the portion of Title VII which extends the Act's protections to federal employees. Nakshian, supra, at 4837. The Senator's cited comments, however, are limited to an observation that "The measures used to protect Federal employees" under § 15 "would be substantially similar" to the provision extending Title VII protections to those employees. 118 Cong. Rec. 24397. The

Senator's remarks do not support plaintiff's assertion that Congress intended to apply the specific Title VII attorney's fee provision to claims brought under § 15 of the ADEA. Instead, they indicate merely that the purpose of that section is to provide federal workers with substantive protections against age discrimination similar to those which they enjoy against other types of discrimination covered under Title VII.

Moreover, had Congress desired to apply the attorney's fee provision of Title VII to § 15 of the ADEA, it could have expressly done so, as it did in applying the attorney's fee provision of FLSA to the other sections of the ADEA. As noted earlier, courts must be careful not to create entitlements to attorney's fees absent explicit and specific congressional authorization. Alyeska, supra, 260-262.

It is important once more to underscore the narrow scope of our decision. We hold only that attorney's fees and costs for services at the administrative level are not available to a claimant who alleges age discrimination in federal government employment. Arguably, Congress has provided such relief pursuant to the Equal Access to Justice Act (EAJA), P.L. 96-481 (1980). However, the EAJA applies only to actions pending on, or commenced on or about October 1, 1981. As plaintiff entered a voluntary dismissal of all her substantive claims prior to that date, the EAJA does not apply to the present action.[3/]

Plaintiff presents sound and persuasive policy arguments for providing at-

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3/ The parties to the present action entered into a stipulation, approved by this court on September 18, 1981, which voluntarily dismissed all plaintiff's claims except her request for attorney's fees under count I.

torney's fees and costs for services at the administrative level to successful federal ADEA claimants. We have sympathy for her position. It may be, as Judge Gasch noted in Kennedy, that the failure to provide such relief was the product of "congressional oversight," supra at 231. However, whatever the reason for this omission, it is for Congress to determine in clear language the class of litigants, to whom and under what circumstances, an award of attorney's fees and costs is appropriate. We find that in the present case, the requisite explicit expression of congressional intent to award such fees and costs to plaintiff is absent.

Conclusion

For the above reasons, we conclude that defendant's motion for summary judgment should be granted.

An order consistent with the foregoing has been entered this day.

/s/
John H. Pratt
United States District Judge

January 19th, 1982.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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VIRGINIA L. SWAIN,

Plaintiff,

vs.

SECRETARY, U.S. DEPARTMENT OF THE NAVY,

Defendant.

Civil Action No. 80-3090

FILED JAN. 19, 1982

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O R D E R

Upon consideration of the cross-motions for summary judgment submitted by the parties, the memoranda of points and authorities filed in support and opposition thereto, and the entire record herein, it is by the court this 19th day of January, 1982.

ORDERED that defendant's motion for summary judgment be and the same hereby is granted.

/s/
John H. Pratt
United States District Judge

January 19th, 1982.

OPINION IN KENNEDY V. WHITEHURST

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Bess KENNEDY, Appellant,

v.

William H. WHITEHURST, Acting Director, Department of Human Services,
No. 81-1374

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United States Court of Appeals
District of Columbia Circuit.

Argued Jan. 12, 1982.

Decided Sept. 17, 1982

Appeal From The United States District Court for The District of Columbia (D.C. Civil Action No. 80-1183).

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Before TAMM, Circuit Judge, ROBB, Senior Circuit Judge, and HOWARD T. MARKEY,*/ Chief Judge, United States Court of Customs & Patent Appeals

Opinion for the court filed by Circuit Judge TAMM.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a)(1976).

TAMM, Circuit Judge:

This case presents the question whether, under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1967 & Supp. IV 1980) (ADEA or the Act), federal employees who gain redress at the administrative level are entitled to recover attorneys' fees for legal services rendered at that stage. United States District Judge Oliver Gasch ruled that Congress had not provided the requisite statutory authorization for an award of fees in cases in which the process of administrative conciliation is successfully employed in the federal employee's favor, and he accordingly denied appellant Bess Kennedy's prayer for such an award against appellee William Whitehurst, the Acting Director of the District of Columbia Department of Human Services (DHS). Since the date of Judge Gasch's ruling, two other

district judges have considered the same issue and have reached the identical result, though each judge employed a slightly different reasoning. Although we too shall travel a somewhat different course than did Judge Gasch in considering the question, we agree that federal employees who prosecute successfully claims of age discrimination under the ADEA at the administrative level are not entitled to an award of attorneys' fees. Accordingly, we affirm.

I.

To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases. The years that have elapsed since the Supreme Court confirmed the prevalence of the so-called "American Rule" that requires each party to bear its own counsel fees absent a contrary statutory provision or common law exception, see

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975), have witnessed no abatement in the number of cases involving attempts to shift the incidence of the costs of lawyers. The judicial focus has, rather, shifted from consideration of the inherent equitable power of courts to award attorneys' fees to the construction of the plethora of federal statutes enacted to create exceptions to the American Rule. There are more than 120 federal statutes authorizing the award of counsel fees in specific situations,[1/] many of which were enacted in response to the Alyeska decision. In recent years this court and many others

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1/ See 4 FED. ATTORNEY FEE AWARDS REP. 2-3 (Harcourt Brace Javanovich) No. 6 (October 1981). Before the decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), approximately thirty federal statutes authorized courts to award attorneys' fees. Alyeska, 421 U.S. at 260 n.33, 95 S.Ct. at 1623 n.33.

have attempted to establish doctrines to govern the exercise of a trial judge's statutory discretion to award attorneys' fees[2/] and have sought to give content to terms of art such as "prevailing party"[3/] and "reasonable fee."[4/]

2/ Compare Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)(per curiam) (prevailing plaintiffs in civil rights cases entitled to fee awards "unless special circumstances would render such an award unjust"), with Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978)(prevailing defendants in civil rights suits entitled to fee award only when plaintiff's underlying claim is "frivolous, unreasonable, or groundless"). See generally Roadway Express, Inc. v. Piper, 447 U.S. 752, 762, 100 S.Ct. 2455, 2462, 65 L.Ed.2d 488 (1980)(distinction between fee awards to civil rights plaintiffs and defendants "advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation").

3/ See e.g., Maher v. Gagne, 448 U.S. 122, 129-30, 100 S.Ct. 2570, 2574-75, 65 L.Ed.2d 653 (1980)(fact that plaintiff "prevailed" through settlement rather than litigation does not compromise right to counsel fees under Civil Rights Attorney's Fees Awards Act of 1976).

4/ See, e.g., Copeland v. Marshall, 641

We may well expect this boom of litigation involving attorneys' fees to continue. In the civil rights area in particular, Congress has wholeheartedly embraced the "private attorney general" rationale and accordingly has encouraged private action to implement public policy through the subsidization of the work of plaintiffs' counsel by private and government defendants. The Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), made clear that the congressional policy favoring private enforcement of civil rights legislation mandated a liberal construction of attorneys' fees provisions in the area of personal rights. 390 U.S. at 401-02, 88 S.Ct. at 965-66. Because the

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4/ continued

F.2d 880 (D.C. Cir. 1980 (en banc); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976)(en banc).

right to seek and maintain employment in an environment free from age discrimination has now been declared such a civil right, we view as fundamental this mandate of a broad reading of the remedial provisions at issue in the instant case. See Rodriquez v. Taylor, 569 F.2d 1231, 1244 (3d Cir. 1977)("unqulified legislative and judicial authority for an award of fees to all successful plaintiffs" in ADEA cases).

Nevertheless, courts considering prayers for attorneys' fees must bear in mind the Alyeska Court's admonition that specific statutory authorization for an award of fees is required before the incidence of counsel costs can be shifted. Rodriquez, 569 F.2d at 1245. This admonition is buttressed by the doctrine of sovereign immunity where attorneys' fees are sought against the federal government; we have held that a waiver of that immunity with regard to an award of attorneys' fees

must either be express or manifest from the relevant legislative history. See Fitzgerald v. United States Civil Service Comm'n, 554 F.2d 1186, 1189 & n.8 (D.C. Cir. 1977); see also United States v. King, 395 U.S. 1, 3-5, 89 S.Ct. 1501, 1502-03, 23 L.Ed.2d 52 (1969); NAACP v. Civiletti, 609 F.2d 514, 516 (D.C. Cir. 1979), cert. denied, 447 U.S. 922, 100 S.Ct. 3012, 65 L.Ed.2d 1114 (1980). Thus, federal courts lack the power to award attorneys' fees to a prevailing party against the government where the only justification is that public policy favors an award. As we noted in Fitzgerald, even if a denial of fees might "make a mockery and a sham of the mandate of Congress,'" no award can be made absent express statutory authorization. 554 F.2d at 1190 (quoting Fitzgerald v. United States Civil Service Comm'n, 407 F. Supp. 380, 386 (D.D.C. 1975)). Argu-

ments centering on the inequities caused by the absence of fee-shifting are properly addressed to the Congress and not to the courts.

It is against this backdrop that we Consider appellant's request for attorneys' fees.

A. The Facts

Neither party questions the factual findings of the district judge. Appellant Bess Kennedy has since 1970 been an employee of the District of Columbia DHS and of its predecessor agency, the Department of Human Resources. In 1978 appellant, then a sixty-two-year-old white female employed as a GS-9 Social Service Representative, applied for a promotion to fill one of twelve vacant positions as a GS-11 Supervisory Social Service Representative. She also applied for a promotion to a position as a GS-11 Employee Development Specialist. Appellant was denied both

promotions, the first in November 1978 and the second in March 1979.

In August 1979 Mrs. Kennedy filed a complaint with the District of Columbia's Office of Human Rights in which she alleged that the promotion denials were the result of discrimination on the bases of race, gender, and age.[5/] In September 1979 appellant filed a complaint alleging only age discrimination with the United States Equal Employment Opportunity Commis-

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5/ Complaint, Kennedy v. Department of Human Resources, District of Columbia Office of Human Rights Docket No. 9-DC-598 (filed Aug. 22, 1979), Joint Appendix (J.A.) at 19-20. On May 14, 1980, this complaint was dismissed by the Office of Human Rights because investigation revealed no evidence to support the discrimination allegations. Memorandum from Anita Bellamy Shelton, Director, Equal Employment Opportunity, Office of Human Rights, to James Buford, Director, Office of Human Rights (May 14, 1980), J.A. at 26. After that dismissal, however, the complaint was remanded to the Office of Human Rights for further consideration. See Kennedy v. Whitehurst, 509 F. Supp. 226, 227 n.1 (D.D.C. 1981).

sion (EEOC).[6] Mrs. Kennedy was assisted by counsel in the preparation of both complaints and in the administrative proceedings that followed.

The administrative efforts at resolution of the dispute proved successful, with no judicial proceedings of any kind required to secure the relief accorded appellant. The parties and the EEOC negotiated a settlement agreement that, as appellant notes, appears to have resolved the age discrimination claim in her favor and that provided for her retroactive promotion to the GS-11 level with an award of back pay.[7] The settlement agreement

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6/ Charge of Age Discrimination Equal Employment Opportunity Commission Charge No. 032-798025 (Sept. 10, 1979), J.A. at 17-18.

7/ An employee of the Equal Employment Opportunity Commission (EEOC) concluded that "age was a factor" in the denial of a promotion to appellant and recommended certain remedial action as a response. Letter from May Short, Equal Opportunity

did not, however, provide for an award of attorneys' fees.

After this success at the administrative level, appellant filed a request with the DHS for the cost of the legal services provided on her behalf before the EEOC. The DHS denied the request, contending that it

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7/ continued

Specialist, Equal Employment Opportunity Commission, to Albert P. Russo, Director, Department of Human Resources (Dec. 13, 1979), J.A. at 21. The Department of Human Resources, although it carried out the recommended remedial action, conceded only that it "appear[ed] that age was a factor" in the denial of a promotion to appellant. Letter from Albert P. Russo, Director, Department of Human Resources, to May Short, Equal Opportunity Specialist, Equal Employment Opportunity Commission (Jan. 23, 1980), J.A. at 22.

Although they pressed the point in the district court, appellees do not contend here that appellant was not a prevailing party under the Age Discrimination in Employment Act (ADEA). Accordingly, we assume, as did the district judge, that appellant prevailed under the ADEA. See Kennedy v. Whitehurst, 509 F. Supp. at 227.

lacked the statutory authority to award fees.[8] Mrs. Kennedy then filed in the district court the complaint that instituted the instant litigation, contending that, as a prevailing party[9] under the ADEA, she was entitled to an award of attorneys' fees for the costs of counsel she incurred at the administrative level. Appellant Kennedy thereupon moved for summary judgment, arguing that the language of the ADEA authorized an award of fees to a federal employee who prevails exclusively through administrative proceedings.

Assuming both that a competitive service employee of the DHS is a federal employee for the purposes of the ADEA and that federal employees have the same rights

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8. Letter from William H. Whitehurst, Acting Director, Department of Human Resources, to Joel P. Bennett, Esq. (Mar. 28, 1980), J.A. at 25.

9. See supra note 7.

to attorneys' fees under the Act as do private sector workers, the district court nonetheless held that the ADEA did not authorize an award of fees for legal services rendered at the administrative level. Kennedy v. Whitehurst, 509 F.Supp. 226, 231-32 (D.D.C. 1981). The district judge concluded that, although an award of such fees might be a sound policy result, Congress had failed, perhaps inadvertently, to empower courts to award counsel fees for legal work done before administrative agencies. Id. at 231 & n.11. As no material facts were in dispute and as the dispositive legal question had been fully briefed, the court sua sponte entered summary judgment in favor of the government agency. Id. at 231-32. This appeal followed.

B. The Statutory Background

The relevant provisions of the ADEA

are, regrettably, a model in imprecision. The ADEA was passed in 1967 to protect older members of the nation's workforce from discrimination premised on age differences. Lorillard v. Pons, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978). As originally enacted, the ADEA applied only to employees in the private sector and adopted as its private enforcement mechanism the compliance scheme that obtained under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980)(FLSA). The relevant ADEA language appears in section 7(b) of the Act and provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title ....

ADEA § 7(b), 29 U.S.C. § 626(b) (1976). The critical cross-reference for present

purposes is to section 16 of the FLSA, 29 U.S.C. § 216 (1976 & Supp. IV 1980). In pertinent part, that section provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction .... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (1976 & Supp. IV 1980). This incorporation by reference makes it clear that, at a minimum, a private sector employee who secures a judgment in litigation under the ADEA is additionally entitled to an award of attorneys' fees against the defendant.

In 1974 Congress amended the ADEA to bring federal employees under the Act's protective umbrella. As amended, section 15 of the ADEA, 29 U.S.C. § 633a (1976 & Supp. IV 1980), "prohibits age discrimina-

tion in federal employment."[10/] Lehman v. Nakshian, 453 U.S. 156, 162, 101 S.Ct. 2698, 2702, 69 L.Ed.2d 548 (1981). Section 15(c) of the ADEA, 29 U.S.C. § 633a(c) (1976), supplies the means for judicial enforcement of the prohibition against age

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10/ ADEA section 15(a) provides:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.
>
> 29 U.S.C. § 633a(a) (Supp. IV 1980).

discrimination; it provides:

> Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Although this language is quite broad and tracks the wording of the provision of the ADEA covering private sector employees,[11/] section 15 does not include the language contained in section 7 that incorporates the FLSA remedial scheme. Thus, in contrast to the ADEA private enforcement scheme detailed in section 7 through reference to FLSA section 16, the Act's federal employee compliance scheme contains no explicit reference to the provision of any form of attorneys' fees. Rather, federal courts are

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11/ Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1976), provides, in pertinent part, that any court enforcing the statute "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter ...."

simply empowered to grant such relief "as will effectuate the purposes" of the Act. 29 U.S.C. § 633a(c)(1976)(emphasis added).

Perhaps the most difficult and confusing issue in the instant case involves the relationship between the public and private sector enforcement schemes. In 1978 amendments to the ADEA, Congress added a subsection (f) to the federal compliance mechanism contained in section 15 that, literally read, mandates a complete divorce between the two schemes. The new subsection, 29 U.S.C. § 633a(f) (Supp. IV 1980), provides:

> Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provision of section 631(b) of this title and the provisions of this section.

Id.; see supra n.10. As the district judge noted in the case at bar, a strict reading of this subsection would require that ques-

tions involving attorneys' fees under section 15--and, for that matter, all issues of relief and remedies for federal employees under the ADEA--be resolved by exclusive reference to the terms of that section. Kennedy, 509 F.Supp. at 228-29. The district judge declined to separate so rigidly the two enforcement patterns, however, in light of his conclusion that neither the public sector nor the private sector enforcement schemes under the ADEA authorized an award of attorneys' fees for legal services performed at the administrative level. Id. at 229, 231-32.

As the government appellee notes, however, an opinion of the Supreme Court that issued subsequent to the district judge's decision in this case casts additional light on the relationship between sections 7 and 15 of the ADEA. In Lehman v. Nakshian, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548

(1981), the Court ruled that, although a private employee who brings an action under section 7 of the ADEA does have the right to a jury trial, a federal employee suing under section 15 does not have that right. Id. at 165, 101 S.Ct. at 2704. Writing for a closely divided court, Justice Stewart stressed the divergence of the public and private employee enforcement schemes; citing the subsection (f) added in 1978 the Court stated that "Congress did not incorporate the FLSA enforcement scheme into § 15," but rather patterned the enforcement mechanism for federal employees after those sections of the Civil Rights Act of 1964 that extended the protection of Title VII to federal employees. Id. at 163-64, 101 S.Ct. at 2703. Justice Stewart relied on the House Report accompanying the 1978 ADEA amendments, which stated that "Section 15 ... is complete

in itself." H.R.Rep. No. 527, 95th Cong., 1st Sess. 11 (1977). The Court concluded that the federal employee enforcement provision is "self-contained and unaffected by other sections" of the ADEA. Nakshian, 453 U.S. at 168, 101 S.Ct. at 2705.

We are left, then, with the following matrix. It is clear that Congress intended that sections 7 and 15 of the ADEA be distinct enforcement mechanisms; the Supreme Court's holding in Nakshian clearly indicates that different rights and remedies may obtain under each of the two enforcement schemes. By the same token, the Court's ruling suggests, as appellant notes, that the enforcement mechanisms for federal employees under the ADEA and Title VII are similar and should be construed in pari materia. As we shall discuss below, the Court's decision in Nakshian provides grist for the mills of both the appellant

and the government appellee.

C. The District Jugdes' Ruling

The district judge properly treated appellant, a competitive service employee of the District of Columbia, as a federal employee for the purposes of the ADEA. Kennedy, 509 F.Supp. at 228 (D.D.C. 1981) (citing 29 U.S.C. § 633a(a) (Supp. IV 1980)). He accordingly shifted the focus of his consideration to the rights of federal employees under the ADEA and to the relationship of section 15 to the ADEA's private enforcement provisions. Fearing that a "literal interpretation" of the language of subsection (f) of section 633a would prove too much by creating totally distinct public and private enforcement schemes, the district judge assumed, arguendo, that federal employees have the same right to attorneys' fees for legal services performed at the administrative

level under the ADEA as do private sector employees; in light, perhaps, of the fact that his decision antedated Nakshian, the district judge was unwilling to assume that a strict dichotomy between the rights and remedies of federal and private sector employees existed. Kennedy, 509 F.Supp. at 228-29. These assumptions were critical, for they necessarily meant that the attorneys' fees inquiry would turn on analysis of the more generous language of section 7, which contains a specific reference to the provisions of such fees.

Even this favorable assumption proved of no avail to Mrs. Kennedy, however. She argued in the district court that the ADEA should be read to permit a fee award for administrative legal services, just as similar language in Title VII had been construed to ground such awards. See Smith v. Califano, 446 F.Supp. 530 (D.D.C. 1978)

(Gasch, J.). Mrs. Kennedy contended that the analogy between the two pieces of civil rights legislation is strong: both the ADEA and Title VII are broad, remedial statutes designed both to proscribe discrimination and to "make whole" those who are the victims of forbidden personnel practices.

The district judge rejected the proposed analogy. Although he noted that both the ADEA and Title VII were appropriately given liberal construction, the differences between the enforcement schemes of each made clear that only under the Title VII regime is an award of attorneys' fees permitted for administrative legal services. The district judge's scrutiny of the relevant statutory language made clear that the authorization of attorneys' fee awards is broader under Title VII than under the ADEA; while Title VII permits fee awards in any "action or proceeding," the FLSA

language contained in the ADEA authorizes awards only to a "plaintiff or plaintiffs" who secure a "judgment" in an "action."[12] Relying on a similar parsing of statutory language conducted by the Supreme Court in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 63 L.Ed.2d 723 (1980), the district judge concluded that the ADEA's use of words suggesting a litigative context indicates that fees are to be awarded only in a court "action" and not in an administrative "proceeding." Kennedy, 509 F.Supp. at 230.

Recognizing the formalistic overtones to such a distinction, the district court found that a structural comparison of Title VII--under which an award of fees for administrative legal services has been held

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12. Compare § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(k) (1976) with Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (Supp. IV 1980).

authorized[13]--and the ADEA further dictated the conclusion that Congress did not contemplate an award of fees for legal services performed at the administrative level in the age discrimination context. While Title VII's enforcement scheme mandates the exhaustion of administrative remedies before a lawsuit may be filed, the ADEA mechanism requires as a practical matter only that notice be given the government of the existence of a complaint. As the district judge put the matter, pursuit of ADEA administrative remedies is "optional and not a mandatory prerequisite to the filing of a civil action." Id.

The district court concluded that the enforcement procedures of the ADEA and Title VII were structured in a purposefully divergent fashion by the Congress: "in

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13/ See Smith v. Califano, 446 F.Supp. 530 (D.D.C. 1978).

ADEA actions, unlike Title VII actions, administrative proceedings are not a pervasive and integral part of the overall scheme of enforcement." Id. at 231. In particular, the district judge noted, ADEA administrative proceedings lack the "adversarial nature" of Title VII's administrative process; whereas Title VII mandates the presentation of the complainant's case at the administrative level, all the ADEA demands at that stage is notice of a complaint. Id. at 230-31. In the absence of a sufficiently specific congressional authorization of fee awards at the administrative level, the district judge invoked the Alyeska presumption against the shifting of the cost of legal services and entered summary judgment in appellee's favor.

D. Related Cases

Subsequent to the district court's

judgment in the instant case, that court reached the identical result in two other cases, albeit by somewhat divergent means. In Muth v. Marsh, 525 F.Supp. 604 (D.D.C. 1981), Judge Gesell concluded that the decision of the Supreme Court in Nakshian had made clear that, although both private sector and federal employees are protected under the ADEA, Congress has created alternative remedial schemes for each class of employees. Thus, he concluded, ADEA section 15 does not incorporate the remedial scheme of section 7, and the structure of remedies for each employee group differs. Examining only the language of section 15, Judge Gesell found it too general to permit an award of attorneys' fees and refused to make such an award to a federal ADEA complainant who had prevailed at the administrative level.

In Swain v. Secretary, 28 Empl.Prac.

(CCH) ¶ 32,574 at 24,585 (D.D.C. Jan. 19, 1982), Judge Pratt similarly ruled that a federal ADEA complainant who secured relief through administrative proceedings was not entitled to an award of counsel fees. Finding the issues in Swain "strikingly similar" to those the district court faced in Kennedy, Swain at 24,587, Judge Pratt concluded that both the language of the relevant FLSA provision and the statutory scheme of the ADEA indicates that Congress did not intend an award of attorneys' fees at the administrative level to age discrimination claimants. He noted that in contrast to the administrative exhaustion requirement mandated by Title VII, the ADEA administrative scheme is only "an alternative option" to the commencement of judicial proceedings. Id. Thus, the district judge reasoned, because the ADEA enforcement scheme provided the complainant

with the option of proceeding initially in federal court after simple administrative notice, the denial of counsel fees at the administrative stage was not an inappropriate result.[14]

E. Summary of the District Court Rulings

Scrutiny of the district court opinions in Kennedy, Muth, and Swain reveals two distinct paths to the same result of denying a fee award to federal employees who prevail at the administrative level under the ADEA. Under the approach adopted

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14. Mention should also be made at this point of DeFries v. Haarhues, 488 F.Supp. 1037 (C.D. Ill. 1980), in which the court held that a prevailing federal age discrimination complainant is entitled under § 15(c) of the ADEA to an award of attorneys' fees for services rendered in connection with judicial processes. Relying on the general language of § 15(c), the DeFries court ruled that an award of attorneys' fees to federal employees "effectuates the purposes" of the ADEA and is thereby authorized. Id. at 1045. The DeFries case is discussed at p. 963, infra.

by the Kennedy and Swain courts, federal and private sector employees are treated similarly for ADEA remedial purposes;[15] the necessary implication of this assimilation would seem to be that employees in neither class are entitled to an award of counsel fees when relief is obtained through administrative proceedings.[16] By contrast, under the approach adopted by the Muth court, federal employees are

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15. This similarity of treatment was an explicit assumption in Kennedy. See 509 F.Supp. at 228-29. In Swain, although the district judge suggested that his decision was limited to ADEA claims involving federal employees, 28 Empl.Prac.Dec. at 24,588, language in that opinion indicates that, for the purpose of administrative level attorneys' fees, private sector and federal employees are treated identically. Id.

16. This result follows necessarily from the express assimilation in Kennedy of private and federal sector employees' rights to administrative stage counsel fees; it follows by implication from the language of the Swain opinion and by that court's express reliance on Kennedy. See also supra note 15.

deemed subject to a totally distinct ADEA enforcement regimen. The necessary corollary of embracing the reasoning adopted by the Muth court would, however, apparently be that no federal emloyee is ever entitled to an award of attorneys' fees under the ADEA, even where he prevails in exclusively judicial proceedings. In sum, each approach denies by implication an award to a group of ADEA prevailng parties not before the court--either to private sector complainants who prevail at the administrative level (Kennedy, Swain), or to federal employees who prevail in judicial proceedings (Muth).

II.

A. The Parties' Positions

In light of the detailed recitation of background information above, the parties' respective positions on appeal may be briefly stated. Appellant Kennedy's

principal contention is that, because ADEA section 15 is "patterned after" comparable Title VII enforcement provisions, the ADEA section is properly read as incorporating the Title VII remedial scheme. Brief for Appellant at 5, 11 (quoting Nakshian, 453 U.S. at 163, 101 S.Ct. at 2703). Accordingly, appellant argues, because the broad "such ... relief as will effectuate the [purposes]"[17] language has been construed to authorize an award of fees for administrative legal work done for federal employees in the Title VII context, see Parker v. Califano, 561 F.2d at 320, 333 (D.C. Cir. 1977); Smith v. Califano, 446 F.Supp. 530, 534 (D.D.C. 1978); the similar ADEA lang-

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17. The relevant language in Title VII federal employee context is, in fact, such relief "as will effectuate the policies" of the statute. 42 U.S.C. § 2000e-16(b) (1976). We assume that no substantive difference was intended in the substitution in the ADEA of the word "purposes" for Title VII's "policies."

uage should be read to authorize comparable awards. In support of this position, appellant relies on the observations made by the Supreme Court in Nakshian to the effect that Congress patterned the federal employee provisions in the ADEA after similar Title VII provisions, see 453 U.S. at 163-64, 101 S.Ct. at 2703, and on statements in the legislative history suggesting that the ADEA was intended to provide "substantially similar" protections and remedial measures to federal employees as those available under Title VII.[18]

Appellant discounts the purported dis-

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18. The principal sponsor of section 15 of the ADEA, Senator Bentsen of Texas, observed that "[t]he measures to protect Federal employees [from age discrimination] would be substantially similar" to those contained in the federal employee provisions of Title VII. 118 Cong.Rec. 24,397 (1972).

tinctions between the ADEA enforcement scheme and the mechanism that obtains under Title VII. Although acknowledging the obvious differences noted by the district judge, appellant contends that administrative procedures play vital roles under both the ADEA and Title VII. The absence in the ADEA's attorneys' fee provision of the "action or proceeding"[19] language, appellant submits, does not evince a congressional intent to authorize fee awards only in cases of actual litigation. Rather, appellant contends, at the time the FLSA was passed, no administrative enforcement procedures existed, and, thus, no fee authorization for such proceedings was required to "make whole" a claimant. Brief for Appellant at 11-12. Appellant concludes that the subsequent development of an

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19. See text accompanying note 12 supra.

administrative reconciliation process necessarily implied the authorization for an award of attorneys' fees.

Finally, appellant cites considerations of public policy in support of her position. The concerns that support a fee award to prevailing race and sex discrimination complaints are equally germane, appellant submits, in the age discrimination context. Similarly, she argues, the congressional policies of "making whole" victims of discrimination and of encouraging the private vindication of civil rights augur in favor of an award of counsel fees to federal emloyees who secure age discrimination relief at the administrative level. In appellant's view, the failure to permit such awards would, moreover, potentially create the anomaly that one who prevailed administratively would secure no fee award, while one who either lost at the adminis-

trative level or even bypassed it[20] but prevailed later in litigation would be reimbursed for the services of counsel. In effect, appellant contends, the approach adopted by the district court penalizes the age discrimination complainant who prevails at the administrative level and results in convolution of the enforcement scheme by discouraging dispute resolution prior to actual litigation.

The government appellee contends initially that the district court lacked jurisdiction over appellant's prayer for fees because appellant allegedly filed her complaint at the administrative level in an untimely fashion and because she failed to

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20. All parties agree that under the ADEA enforcement scheme applicable to federal employees the complainant may simply supply the requisite thirty days' notice and proceed directly thereafter in federal court; no invocation of administrative remedies is required. 29 U.S.C. § 633a(d)(1976).

exhaust administrative remedies. Brief for Appellee at 7 n.6. On the attorneys' fees issue itself, appellee, adopting the position later embraced by the Muth court, argues initially that the Congress established a distinct enforcement scheme for federal employees, one that does not authorize an award of attorneys' fee under any conditions.

Appellee relies heavily on Nakshian in support of his position. The Court in tht case made clear, appellee submits, that ADEA section 15 is separate and "complete in itself," Nakshian, 453 U.S. at 168, 101 S.Ct. at 2705 (quoting H.R.Rep. No. 527, 95th Cong., 1st Sess. 11 (1977)), and is "unaffected by other sections" of the ADEA. Nakshian, 453 U.S. at 168, 101 S.Ct. at 2705. Appellee concedes that section 15 is patterned after Title VII's comparable

federal employee provisions but argues that the failure of Congress to incorporate a separate attorneys' fees provision into ADEA section 15--as that body unquestionably so incorporated into the comparable Title VII scheme[21]--deals a fatal blow to appellant's position. Moreover, appellee contends that the broad language of section 15 authorizing such "relief as will effectuate the purposes" of the ADEA cannot

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21. The federal employee provisions of Title VII include § 717(d), 42 U.S.C. § 2000e-16(d) (1976), which specifically incorporates several of the private employee provisions of the statute. Included in this incorporation is § 706(k), 42 U.S.C. § 2000e-5(k) (1976), which specifically provides for the award of attorneys' fees to a prevailing party. Thus, as this court noted in Parker v. Califano, 561 F.2d 320, 323 (D.C.Cir. 1977), "[t]he effect of Section 717(d) coupled with Section 706(k) is, therefore, to allow a federal court, in its discretion, to award reasonable attorneys' fees to a federal employee or applicant who is the prevailing party in any 'action or proceeding' under Title VII." No such incorporation exists, it is worth noting, with regard to the ADEA.

be given unlimited scope; appellee notes that the Nakshian Court, for example, clearly indicated that the language does not give courts carte blanche to structure either the process or the provision of relief. Appellee thus concludes that the general language of section 15 is insufficient to authorize an award of attorneys' fee for work performed at either the administrative or the judicial level. Accordingly, appellee argues that the district judge was correct in denying Mrs. Kennedy a fee award, although he of course demurs to the reasoning employed.

In the alternative, appellee contends that the language and structure of the general ADEA remedial scheme suggest that, while an award of counsel fees for work performed on behalf of federal claimants at the judicial level may be available, no such award is contemplated for legal

services rendered at the administrative stage. Although conceding the similarities between the federal employee provisions of Title VII and those of the ADEA, appellee submits that the ADEA's attorneys' fee provision is considerably narrower in scope than that of Title VII: whereas Title VII authorizes an award of counsel fees to any federal employee who succeeds in an "action or proceeding," 42 U.S.C. §2000e-5(k) (1976) (emphasis added), the ADEA permits comparable awards only in connection with an "action." Appellee argues that this linguistic distinction, when combined with the differing roles played by administrative proceedings under Title VII and the ADEA, suggests that absence of the congressional authorization required by Alyeska to ground an exception to the American Rule proscribing fee-shifting.

III.

A. Juristiction

As a preliminary matter, we must rule on the government appellee's claim that the district court lacked jurisdiction to hear appellant's prayer for attorneys' fees. Appellant argues that, because Mrs. Kennedy's discrimination complaints were allegedly filed in an untimely fashion with the relevant administrative agencies and because she failed to pursue to fruition her claims in those agencies, the distrct court was precluded as a matter of jurisdiction from hearing the instant case. With regard to the allegation of untimely filing, appellant responds that the timeliness requirement is not jurisdictional but rather is akin to a staute of limitations; accordingly, appellant argues, charges of untimeliness, however valid, are subject to waiver and estoppel and were here waived by

appellee's failure to press the arguments in the district court. Similarly, appellant contends both that the ADEA exhaustion requirement is not a jurisdictional matter and that, at any event, she in fact met the requirement.

We agree with appellant's position on both the timeliness and the exhaustion issues. To be sure, the requirements that a federal age discrimination complainant file a notice of complaint and exhaust available administrative remedies may be prerequisites for the institution of a lawuist in federal court based on the discrimination allegation. See, e.g., Milton v. Weinberger, 645 F.2d 1070, 1074-77 (D.C.Cir. 1981); Siegel v. Kreps, 654 F.2d 773, 783 (D.C.Cir. 1981)(Robinson, J., concurring in part and dissenting in part). We are convinced, however, that the timeliness and exhaustion requirements are

not jurisdictional in nature but rather are statutory conditions precedent to the instigation of litigation and are therefore subject to waiver, estoppel, and equitable tolling. The failure to raise these issues in the district court thus precludes reliance on them here.

As for the timeliness dispute, our ruling that the ADEA's timing requirements are not jurisdictional prerequisites is fortified by the Supreme Court's recent decision in Zipes v. Trans World Airlines, ___ U.S. ___, 102 S.Ct. 1127, 71 L.Ed.2d 1127 (1982). In Zipes the Court held that the timely filng with the EEOC of a charge of discrimination in violation of Title VII is not "jurisdictional" in nature but rather is a mere statutory precondition subject to equitable defenses. Accord Bethel v. Jefferson, 589 F.2d 631, 641 n.64 (D.C.Cir. 1978). The analogy to the ADEA

is strong in this regard, and we think it clear that Congress did not intend the statutory deadlines it inserted in the ADEA to be jurisdictional in character. Thus, we need not determine whether, in fact, appellant failed to comply with administrative regulations regarding timeliness or, indeed, whether those regulations bind appellant at all. Appellee's failure to raise the issue in the district court precludes its consideratin here.

With regard to the claim that appellant's prayer for fees should be dismissed for her failure to exhaust administrative remedies, it would again appear that this requirement is not jurisdictional in character for the reasons stated above. See Bethel, 589 F.2d at 640-46. At any event, appellant satisfied the only exhaustion requirement mandated by section 15 of

the ADEA, that of either providing the EEOC with notice of an intent to sue within 180 days of the unlawful practice, or actually filing a discrimination complaint with the EEOC.[22/] See 29 U.S.C. § 633a(d) (1976); Siegel v. Kreps, 654 F.2d at 778 n.16.

Accordingly, appellant's demand for attorneys' fees was properly before the district court.

B. Analysis

As noted above, the district judge properly treated appellant, a competitive service employee of the District of Columbia, as subject to the ADEA's federal employee provisions. Kennedy, 509 F. Supp.

22/ Following the latter course, Mrs. Kennedy filed such a complaint on September 10, 1979, and secured all relief she requested, save for attorneys' fees. That she also had pending a complaint with the District of Columbia's Office of Human Rights does not, it is clear, affect her rights to sue under the ADEA.

at 228.[23] We cannot agree, however, with the district judge's critical assumption that federal employees in actions brought under ADEA section 15 enjoy the same right to an award of counsel fees as do privae sector employees under section 7. Although construction of the respective sections could, in fact, lead to that result, the district court's inextricable correlation of federal and private emloyee remedies cannot stand in light of the Supreme Court's subsequent decision in Nakshian. As discussed earlier, the Court in that case concluded that the ADEA enforcement schemes

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23. Section 15(a) of the ADEA is applicable, inter alia, to personnel actions in "those units of the government of the District of Columiba having positions in the competitive service ...." 29 U.S.C. § 633a(a) (Supp. IV 1980). Mrs. Kennedy was, or course, employed in the competitive service of the District of Columbia at the time of the alleged employment discrimination.

for public and private sector employees differ in fundamental respects and that divergent rights and remedies may obtain under the schemes. Thus, we conclude that the remedial structure of section 15 is, as the Supreme Court noted, "self-contained and unaffected by other sections [of the ADEA], including those governing procedures applicable in actions against private employers." Nakshian, 453 U.S. at 168, 101 S.Ct. at 2705.

This conclusion has a significant bearing on the analytical model that we apply to the resolution of the issue sub judice, for it means--precisely as the district court feared--that the question must be resolved by reference to the language of section 15 alone. See Kennedy, 509 F.Supp. at 228. Thus, the issue we face, simply stated, is whether language empowering a court to grant such legal or

equitable relief "as will effectuate the purposes" of the ADEA provides a sufficient basis for an award of attorneys' fees for administrative legal servies. See ADEA § 15(c), 29 U.S.C. § 633a(c) (1976).

Although the sole source of authorization for the fees requestd by appellant is thus the language of section 15(c) of the ADEA, it is not the case that our focus must be solely on that subsection; indeed, the very language of section 15(c) mandating such relief as is necessary to implement the purposes of the ADEA suggests that the determination of appropriate remedies must be informd by the ADEA as a whole. Recognizing this interplay, appellant argues that a fee award in cases such as the instant one would facilitate the vindication of civil rights and stresses that the same language as that appearing in ADEA section 15(c) has been held to

authorize administrative fee awards under Title VII. See Smith, 446 F.Supp. at 534.

It is true, as appellant notes, that an award of fees for administrative legal services might contribute to the resolution of age discrimination complaints through agency processes and that this enhancement of the role of administrative proceedings might obviate frequent recourse to federal courts for relief. It is also true that a statutory provision need not contain the words "attorneys' fees" to permit such awards; rather, it is sufficient if the Congress had "clearly indicated" that the provision should be so construed. Fitgerald v. United States Civil Service Comm'n, 554 F.2d 1186, 1189 & n.8 (D.C.Cir. 1977). We thus agree with appellant that clear evidence of congressional intent to award counsel fees may suffice, in the absence of an explicit authorization, to

ground an exception to Alyeska and that the omission of the magic words "attorneys' fees" is not necessarily fatal to a prayer for such an award.[24]

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24. There have been post-Alyeska cases in which a fee award has been made in the absence of express authorization. See, e.g., Smith v. Califano, 446 F.Supp. at 533 (D.D.C. 1978) ("Although the Congressional intent to include attorneys' fees must be clear, it may be expressed in terms other than the use of those specific words.") On the other hand, most of the cases cited in support of this proposition by appellant either embrace the point only in dicta, or, indeed, refuse to permit a fee award on such a basis. See Director, Office of Workers' Comp. Programs v. South East Coal Co., 598 F.2d 1046 (6th Cir. 1979) (specific authorization involved by virtue of incorporation); National Ass'n of Letter Carriers v. United States Postal Service, 590 F.2d 1171 (D.C.Cir. 1978) (award denied); Republic Steel Corp. v. U.S. Dep't of Labor, 590 F.2d 77 (3d Cir. 1978) (specific authorization involved by virtue of incorporation); Fitzgerald v. United States Civil Servie Comm'n, 554 F.2d 1186 (D.C.Cir. 1977) (award denied). See generally Reply Brief for Appellant at 2-3. Thus, the mandate of Alyeska would appear to demand quite clear--indeed, virtually incontrovertible--evidence of congressional intent to ground a fee award by implication.

We are, however, mindful of the Alyeska Court's admonition that a specific, if not explicit, authorization is required to overcome the presumption against fee-shifting. In light of this admonition, the general language employed in section 15(c), and, quite significantly, the more limited role played by administrative proceedings under the ADEA, we have reached the conclusion that no award of fees may be made in the present case. The structure of the ADEA, the wording of section 15(c), and the logic of prior judicial decisions all lead to this result.

Although the language of section 15(c) may be "sweeping" and "exceptionally expansive," Bertrand v. Orkin Exterminating Co., 432 FD.Sup. 952, 953, 956 (N.D.Ill. 1977) (construing identical language in section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1976)), it is also exceedingly

vague. We are accordingly hesitant to hold that such broad language constitutes the specific statutory exception to the American Rule demanded by Alyeska, at least in the absence of compelling support in other statutory language or in the legislative history.

Appellant places in this regard considerable realiance on a district court decision, DeFries v. Haarhues, 488 F.Supp. 1037 (C.D.Ill. 1980). In DeFries the court held that a federal employee was entitled to an award of counsel fees for services performed in connection with ADEA litigation; although the court did not hold that the attorneys' fees provision of ADEA section 7 inured to the benefit of federal employees, it did rule that an award for services performed at the judicial level was authorized by section 15 because the award "effectuate[d] the purposes" of the ADEA. Id. at 1045.

We agree with the basic approach of the DeFries court; when the statutory language invites a consideration of "the purposes" of a piece of legislation to detremine relief, scrutiny must be accorded the overall goals and structure of the statute. We need express no opinion, however, on the correctness of the result in DeFries, for judicial actions clearly play a role distinct from administrative proceedings in the ADEA enforcement scheme. We cannot agrèe with appellant that DeFries compels or even strongly suggests a finding that an award of fees for administartive legal services "effectuates the purposes" of the ADEA.

Upon close study of the ADea remedial scheme, we are convinced that any mild "effectuation" of the purposes of the Act flowing from an award of counsel fees to

one in appellant's position is insufficent to overcome the hurdle posed by Alyeska. Notwithstanding appellant's repeated invocation of Title VII and the similarity of the federal employee provisions of the ADEA to it, it remains the case that administrative proceedings are not intended to serve the same purposes under the two statutes. Under Title VII, the federal complainant must initially seek relief in the agency that has allegedly discriminated against him; if the complainant is dissatisfied with the agency's final decision, he may in turn either appeal to another agency or, if he prefers, file suit directly in federal court after the expiration of thirty days from the date of the final ruling. At any event, the complainant under Title VII may file a federal court action once 180 days have elapsed from the date of the filing of the inital charge

or the filing of the appeal, if the initial agency or the appellate body has not taken final action. See 42 U.S.C. §§ 2000e-16(c) and (d) (1976), incorporating 42 U.S.C. §§ 2000e-5(f) through (k) (1976); Parker, 561 F.2d at 3223. As the Supreme Court noted in Brown v. General Services Administation, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), the federal employee provisions of Title VII "establish complementary ... enforcement mechanisms" providing for a "careful blend of administrative and judicial enforcement powers." Id. at 831, 833, 96 S.Ct. at 1968. The "bottom line" in this regard is clear: Congress mandated that Title VII complainants exhaust certain admnistrative remedies as a precondition to filing an action in federal court.

By contrast, under the ADEA, "pursuit of a remedy through [administrative] channels is optional and not a mandatory prere-

quisite to the filing of a civil action." Kennedy, 509 F.Supp. at 230. Neither the private nor the federal employee sections of the ADEA requires anything more by the way of "exhaustion" than the provision of notice to the appropriate federal official of the intention to sue. Id. Although Congress established a supplementary administrative procedure to assist in the enforcement of the ADEA, it remains the case that resort to that procedure is optional and that, in contrast to the usual course under Title VII, no quasi-adversarial proceedings of any sort are required. See Parker, 561 F.2d at 331-33; see also New York Gaslight Club v. Carey, 447 U.S. 54, 69-70, 100 S.Ct. 2024, 2033-34, 64 L.Ed.2d 723 (1980). Accordingly, it is beyond cavil that the administrative proceedings required under the ADEA are not of the same ilk as those under Title VII that prompted us in Parker to observe that

"[a]ny realistic assessment of Title VII administrative proceedings requires the conclusion that--despite the fact that they are not strictly adversarial--an employee would often be ill-advised to embark thereon without legal assistance." 561 F.2d at 332. As the district judge noted in the case at bar, these concerns of fair play and equity are not apposite "where the first adversarial step in which a party is required to present his case is the filng of a complaint." Kennedy, 509 F.Supp. at 231. The notice requirement could easily be fulfilled by the layman or inexpensively performed by counsel. Id.

Thus, we agree with the district judge that administrative proceedings under the ADEA are not a "pervasive and integral part of the overall scheme of enforcement." Id.; accord Swain v. Secretary, 28 Empl.

Prac.Dec. (CCH) ¶ 35,574, at 24,585 (D.C.C. Jan. 19, 1982). It is thus difficult to determine how an award of counsel fees for services performed in such optional proceedings could "effectuate the purposes" of the ADEA in any significant way. This conclusion is, moreover, reinforced when we examine the language of the attorneys' fee provision under the private enforcement section of the ADEA. As noted above, that provision calls for the award of fees to any "plaintiff" who secures a "judgment" in an "action" brought under the Act; as the district judge noted, the litigative orientation of these terms is manifest. In both the New York Gaslight Club and Parker decisions, the respective tribunals in awarding administrative legal fees under Title VII emphasized the use of the disjunctive phrase "action or proceeding" as evidence of congressional intent to

authorize such awards. By necessary implication, the absence of such language in the ADEA counsels against an award of fees in the instant case.

In response to this position, appellant contends that when initially enacted in 1967 no significant administrative procedures existed for which reimbursement for the work of counsel might be required. Brief for Appellant at 12. Thus, appellant contends, when Congress amended the ADEA in 1974 to cover federal employees, it must have intended to provide those employees with attorneys' fees for administrative legal services for the administrative processes that were added in that year. Whatever the merits of this argument might be as a matter of theory, there is not a whit of evidence in the legislative history to support it; general remarks regarding the breadth of relief

intended under section 15 cannot substitute for the sort of concerte indicia of congressional intent to award counsel fees needed to permit an exception to Alyeska. Moreover, in this spirit of reasoning by implication, we would note that Congress amended the ADEA in 1978 to provide, inter alia, that section 15 was not affected by any other substantive provision of the Act. See 29 U.S.C. § 633a(f) (Supp. IV 1980). Thus, in amending the section as it did, Congress could quite easily have amended it further to provide explicitly for an award of attorneys' fees under the circumstances at issue in the case at bar. Cf. Nakshian, 453 U.S. at 1678, 101 S.Ct. at 2705 (Congress failed to amend ADEA to provide right to jury trial for federal ADEA complainants.) Moreover, though the point that "Congres knew how to do it if it had wished" is easily made and rarely refuted

regardless of its probity, we would note that, in spite of the obvious model supplied by the incorporation susbsection of Title VII, Congress did not incorporate even the more limited FLSA attorneys' fee provision into the section 15 enforcement scheme. Though we fully recognize that the failure of Congress to act in a particular way is often of limited evidentiary value, such a failure is, in our opinion, no less probative of congressional intent than is the "silent adoption" approach urged by appellant.

In sum, the conjunction of the vague authorizing language of section 15(c), the more circumscribed role of administrative proceedings under the ADEA enforcement scheme, and the omission of the word "proceeding" from the attorneys' fee provision in the private employee section of the statute combine to convince us that

Congress did not intend to award counsel fees to an ADEA claimant in appellant's position. We do not view this result as in any fashion inconsistent with Smith v. Califano, in which language identical to that of ADEA section 15(c) was held to authorize an award of attornyes' fees for administrative legal work. That case involved federal employee rights under Title VII, and, as we have stressed above, administrative proceedings are clearly intended under that statute to play a central role in dispute resolution. Thus, although we express no opinion on the correctness of the Smith result, it is manifest that the two contexts are distinguishalbe notwithstanding the similarity of the statutory language. Moreover, we might note en passant that the same district judge who wrote the Smith decision issued the opinion under challenge

in the instant case; apparently the differences in structure between the two statutes were sufficent to persuade him that the question of fee authorization under each was a distinct matter, and with that we agree.

Finally, we address briefly the arguments of policy proffered by appellant in support of her position. On what might be called the positive side of the ledger, appellant contends that the provision of attorneys' fees for administrative proceedings under the ADEA will enchance the utility of those proceedings as a mode of dispute resolutoin, thus aiding all concerned and leading to the "conservation of judicial time." Parker, 561 F.2d at 333. While this may well be true, it is not our province to rewrite the scheme of remedies adopted by the Congress in enacting the ADEA to establish a more

perfect system to combat age discrimination. On the negative side, appellant argues that a denial of counsel fees will encourage victims of discrimination to intiate court actions "prematurely" and will discourage them from pursuing diligently admninistrative processes to fruition; appellant accordingly contends that the failure to award fees will relegate the administrative process to a "pro forma exhaustion step." Brief for Appellant at 23 (quoting Smith, 446 F.Supp. at 534). The simple answer to this point is that Congress apparently anticipated, and indeeed, authorized, this rush to the courthouse, and, again, it is not our province to rewrite the legislation in a more "rational" manner. Even if, moreover, the failure to authorize an award of fees to one in appellant's position was a product of congressional oversight or inadvertence, we

can only endorse the position of the district judge on this score--any such cries of oversight or omission are properly addressed to the Congress and not to the courts. See Kennedy, 509 F.Supp. at 231 & n.11.

IV.

Given the confusing and arguably conflicting decisions in the area of authority of federal courts to award federal employees fees for legal services performed under civil rights legislation at the administrative level, it is useful for us to summarize what our holding today does not involve. We do not hold that federal ADEA claimants have no entitlement to a fee award for the services of counsel rendered in connection with judicial actions. We thus do not by our holding in the case at bar express any view on the argument of appellee, apparently embraced by the court

in Muth v. Marsh, that section 15 provides an insufficient authorization for any award of counsel fees irrespective of the nature of the action.[25]

Secondly, we do not today express a view on the availablity of fee awards to private sector employees for legal services performed under the ADEA at the administrative level. Since the district judge in the instance case assumed that private sector and federal employees enjoy the same right to administrative level fee awards, his decision involved as a necessary concomitant a ruling that private sector employees have no such fee right as well. As dis-

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25. Indeed, in light of the centrality of judicial actions to the remedial scheme of the ADEA, one could at least argue that attorneys' fees for work performed in connection with court action are necesary to effectute the remedial purposes of the Act. See, e.g., DeFries v. Haarhues, 488 F.Supp. 1037, 1045 (C.D.Ill. 1980).

cussed above, we have not made the same assumption of identity of rights, and thus we express no conclusion on the availability of administrative counsel awards to private sector employees proceeding under section 7 of the ADEA.

Our holding today is only that an award of attorneys' fees and costs may not be made under section 15 of the ADEA to a federal employee who secures relief solely through administrative processes. Because the district judge reached the same conclusion, his decision is

Affirmed.

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No. 82-1644

In the Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA L. SWAIN, PETITIONER

v.

JOHN LEHMAN, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1644

VIRGINIA L. SWAIN, PETITIONER

v.

JOHN LEHMAN, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a federal employee, contends that the courts below erred in declining to award her attorney's fees and costs in connection with administrative proceedings on her complaint under Section 15 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a.

1. Petitioner, an employee of the Department of the Navy, filed an administrative complaint on August 11, 1977, claiming that she had been denied a quality step increase and a promotion because of her age, in violation of Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. Administrative hearings were held in 1979. On October 29, 1980, the Department of the Navy, adopting the decision of a Complaints Examiner of the Equal Employment Opportunity Commission, issued a final decision finding that the Department had discriminated against petitioner by failing to promote her. Petitioner was awarded a retroactive promotion, back pay, and retirement adjustments (Pet. App. 4a-5a).

On December 3, 1980, petitioner filed this action in the United States District Court for the District of Columbia. On September 18, 1981, the parties stipulated to the voluntary dismissal of all aspects of the complaint, with the exception of petitioner's claim for attorney's fees and costs in connection with the administrative proceedings (Pet. App. 5a). On January 19, 1982, the district court entered summary judgment for the government on that issue, holding that attorney's fees and costs incurred in connection with administrative proceedings may not be awarded to a person who prevails on a complaint against the federal government under Section 15 of the ADEA (Pet. App. 3a-17a). The court of appeals affirmed by judgment order (*id.* at 1a-2a) on the basis of its prior holding to the same effect in *Kennedy* v. *Whitehurst*, 690 F.2d 951 (D.C. Cir. 1982).

2. The decision of the court of appeals is correct and consistent with the holding of this Court in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), and it does not conflict with the decision of any other court of appeals. Further review therefore is not warranted.

a. It is, of course, well established that under the American Rule, a prevailing party is not entitled to recover attorney's fees from the opposing party and that the federal courts should not recognize exceptions to that Rule absent specific congressional authorization. See, *e.g.*, *Summit Valley Industries* v. *Carpenters Local 112*, 456 U.S. 717, 721-723 (1982); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 260-262 (1975). Moreover, where, as here, the federal government is the defendant, principles of sovereign immunity require that any authorization for the award of fees—one of the terms of the government's consent to be sued—must be "unequivocally expressed." See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court

recently held that these principles of sovereign immunity apply to suits under Section 15 of the ADEA, the statutory provision at issue here. See *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981). Relying on these principles, the Court held in *Lehman* v. *Nakshian* that there is no right to a jury trial in a suit against the federal government under Section 15 of the ADEA. The analysis employed by the Court in *Lehman* v. *Nakshian* requires the conclusion that attorney's fees likewise may not be awarded in a suit against the federal government under Section 15 of the ADEA.

Section 15(c) of the ADEA provides that "[a]ny person aggrieved [by age discrimination in federal employment] may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this [Act]." 29 U.S.C. 633a(c). There is no express authorization for an award of attorney's fees. Under the American Rule and the doctrine of sovereign immunity, this alone is a sufficient basis for concluding that fees may not be awarded. This conclusion is reinforced by the fact, explained below, that when Congress wanted to authorize an award of attorney's fees under other sections of the ADEA, it expressly so provided. *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 162-163; *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 (1981).

When it originally was enacted in 1967 (Pub. L. No. 90-202, 81 Stat. 602), the ADEA applied only to private employers, not to the federal, state and local governments. *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 166. Under Section 7(b) of the ADEA, 29 U.S.C. 626(b), the Act is enforced against private employers in accordance with procedures provided in the Fair Labor Standards Act (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.* See *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 160; *Lorillard* v. *Pons*, 434 U.S. 575, 578-583 (1978). Section 16(b) of the FLSA, 29 U.S.C. (Supp. V) 216(b), expressly provides for the award

of attorney's fees and costs in an action brought by a person against an employer who violates that Act, and such fees and costs therefore may be awarded in a suit against a private employer under Section 7(c) of the ADEA, 29 U.S.C. (Supp. V) 626(c).

Congress amended the ADEA in 1974 (Pub. L. No. 93-259, Section 28, 88 Stat. 74) to cover federal, state and local government employees. State and local governments were brought under the existing enforcement scheme applicable to private employers by expansion of the term "employer" in Section 4(a) of the ADEA, 29 U.S.C. 623(a), to include state and local governments. This had the effect of extending the procedural provisions of the FLSA to suits against such entities (*Lehman* v. *Nakshian*, *supra*, 453 U.S. at 166), including the provision for attorney's fees. But although it was first proposed to include the federal government under the existing FLSA enforcement scheme as well (*id.* at 166-167 n.14), Congress instead enacted a separate provision — Section 15 — addressing age discrimination in federal employment. As this Court has observed, Section 15 does *not* incorporate the FLSA enforcement scheme for federal sector ADEA cases (*Lehman* v. *Nakshian*, *supra*, 453 U.S. at 163, 166-167), and the FLSA's authorization for the award of attorney's fees and costs therefore does not apply to federal sector cases.[1] This conclusion was reinforced in 1978 by the enactment of Section 15(f) of the ADEA, 29 U.S.C. (Supp. V) 633a(f), which provides that, with one exception

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[1]Congress instead patterned Section 15 of the ADEA after Section 717 of Title VII of the Civil Rights Act of 1964, as amended in 1972 (Pub. L. No. 92-261, 86 Stat. 111-112), 42 U.S.C. 2000e-16, which governs discrimination in federal employment on the basis of race, color, national origin, religion and sex. Significantly, under Title VII, Congress *expressly* incorporated into the federal sector Title VII provisions the attorney's fee provision applicable to private sector cases. See 42 U.S.C. 2000e-16(d), incorporating 42 U.S.C. 2000e-5(k).

not relevant here, federal personnel actions "shall not be subject to, or affected by, any provision of this chapter other than * * * the provisions of this section." This language makes explicit that Section 7(b) of the ADEA—the section that incorporates the FLSA procedures for ADEA suits against private employers and state and local governments—does not apply to federal sector ADEA suits under Section 15. See *Lehman* v. *Nakshian, supra*, 453 U.S. at 163, 167-168.[2]

b. Petitioner acknowledges that there is an "absence of an explicit authorization of fees in the statute" (Pet. 37), but she contends (Pet. 24-31) that an award of attorney's fees is encompassed within the provision in Section 15(c) for the award of "such legal and equitable relief as will effectuate the purposes of [the] Act." This contention is without merit. The quoted language cannot be viewed as the requisite "unequivocally expressed" waiver of the government's sovereign immunity to the payment of attorney's fees. See *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203-204 & n.3 (1979) (litigation costs not part of "just compensation" required to be paid by Fifth Amendment). Nor, against the

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[2]Petitioner contends (Pet. 38-42) that prior to the 1978 amendments adding Section 15(f), the FLSA procedures—including the authorization for the award of attorney's fees—applied to federal sector cases and that the 1978 amendment should not be applied retroactively to her case, which was commenced administratively by the filing of a complaint in 1977, before passage of the 1978 amendments. This argument is frivolous. The FLSA procedures were inapplicable to federal sector ADEA cases even prior to the enactment of Section 15(f), which simply made this inapplicability explicit. *Lehman* v. *Nakshian, supra*, 453 U.S. at 166-167. Moreover, even if the 1978 amendments were thought to adopt new law barring the award of attorney's fees for the first time, those amendments were enacted prior to the administrative hearing that presumably consumed most of petitioner's attorney's efforts. Finally, to the extent that petitioner's claim depends upon the construction of pre-1978 law, it is of no continuing importance.

background of the American Rule, can the ordinary meaning of the language be extended to encompass the distinct element of fees. Cf. *Summit Valley Industries* v. *Carpenters Local 112, supra*, 456 U.S. at 724-725.

Moreover, Section 7(c) provides for the award of relief in non-federal sector ADEA suits in the same language as that in Section 15(c), upon which petitioner relies. The identical language in Section 7(c) is not the source of the authorization for the award of attorney's fees in non-federal sector cases. Congress instead found it necessary to authorize the award of attorney's fees and costs in Section 7(b), through the incorporation of the provision for attorney's fees and costs under the FLSA. The same language therefore cannot be construed in Section 15(c) implicitly to include an authorization for the award of fees. Furthermore, this Court recently has stressed that the American Rule barring the award of attorney's fees except where Congress has expressly so provided cannot be circumvented—and fees in connection with prior administrative proceedings allowed—merely because a court might believe that such an award would further the congressional purpose underlying the statute. See *Summit Valley Industries* v. *Carpenters Local, supra*, 456 U.S. at 723-726.[3] That rationale applies equally here.[4]

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[3]Petitioner errs in relying (Pet. 31-37) on the authorization in 5 U.S.C. (Supp. V) 7701(g)(2) for the award of fees in certain proceedings before the Merit Systems Protection Board. Congress there, of course, expressly authorized the award of fees in connection with a particular type of administrative proceeding. Congress did not do so, however, under Section 15 of the ADEA.

[4]Petitioner does not contend that she is entitled to an award of fees and costs under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d)(3). There would be no occasion to consider that question here in any event, because the administrative proceedings in this case terminated well before the October 1, 1981 effective date provided in Section

In any event, even if the award of attorney's fees in connection with *judicial* proceedings could be said to be appropriate to effectuate the purposes of the Act (see *DeFries* v. *Haarhues*, 488 F. Supp. 1037 (C.D. Ill. 1980)), as the court of appeals held in *Kennedy* v. *Whitehurst*, *supra*, 690 F.2d at 963-965 (Pet. App. 73a-79a), this rationale does not apply to fees incurred in connection with administrative proceedings. Unlike the situation under Title VII of the Civil Rights Act of 1964 (see 42 U.S.C. 2000e-16(c)), the full pursuit of administrative remedies under Section 15 of the ADEA is optional; the only requirement is that notice be given to the Equal Employment Opportunity Commission at least 30 days in advance of filing suit. 29 U.S.C. 633a(d). Administrative proceedings thus play a somewhat less important role under the ADEA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1983

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208 of that Act, Pub. L. No. 96-481, 94 Stat. 2330. *S & H Riggers & Erectors, Inc.* v. *OSHRC*, 672 F.2d 426, 428 (5th Cir. 1982); *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73, 76-77 (4th Cir. 1982); *Muth* v. *Marsh*, 525 F. Supp. 604, 609 (D.D.C. 1981).

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